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## **Liability to Deception and Manipulation: The Ethics of Undercover Policing**

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**ABSTRACT** *Does undercover police work inevitably wrong its targets? Or are undercover activities justified by a general security benefit? In this article I argue that people can make themselves liable to deception and manipulation. The debate on undercover policing will proceed more fruitfully if the tactic can be conceptualised along those lines, rather than as essentially 'dirty hands' activity, in which people are wronged in pursuit of a necessary good, or in instrumentalist terms, according to which the harms of undercover work are straightforwardly overcome by its benefits. This article motivates the 'liability view' and describes its attractions, challenges, and implications.*

### **Introduction**

Undercover police act in ways that are, in normal circumstances, ways of wronging people. Their actions cause several kinds of harms and setbacks to people's lives. Targets can be deceived, manipulated, have their privacy invaded, have their material interests set back, be encouraged to act in ways that are themselves wrong, and officers may omit to act in ways that would prevent harm. Being subject to acts of concerted deception and manipulation can lead to uncertainty about one's social sphere, and having the grounds for trust in this is constitutive of a general good, or is necessary for others. Consider the case of Mark Jenner, an undercover officer in the United Kingdom who gathered intelligence on the Colin Roach Centre, a group that had the goal of exposing police corruption and racism. He obtained information about the group by having a long-term relationship with one of its members. The victim of the deception now talks of her need for a 'grieving process', and of the way in which her relationship with him has coloured all of her subsequent relationships.<sup>1</sup> Even when people do not ever discover the fact of manipulation, it is arguable that a harm has occurred. If truth or success are elements of a good life, then deceptive police activity has the potential to set back people's interests by rendering their projects unfulfilled or corrupted.

What would an ideal structure of undercover policing activities look like? In this article I propose the notion of *liability* as a guiding ethical concept. According to this idea, those who engage in wrongdoing make themselves morally liable to preventive activities.<sup>2</sup> These can involve methods that are harmful and would otherwise be wrongful. Given the recent prominence and usefulness of the concept of liability in other areas of applied philosophy, including in its relation to criminal justice and punishment,<sup>3</sup> we can expect it to be a fruitful concept in a policing context. It has thus far

received little attention in work on the justification and ethics of policing.<sup>4</sup> Furthermore, remarkably, the laws in the United Kingdom governing undercover policing pay little due to the concept, even though it is both a highly plausible norm, and is expressed in other elements of the governance of policing.<sup>5</sup>

### **The Dirty Hands Model**

One way of understanding the moral status of undercover work is as a case of dirty hands. As one undercover police officer said when asked about the ethics of his work, 'that's like trying to invent dry water or fireproof coal'.<sup>6</sup> The view often attributed to Machiavelli is that power inevitably involves doing some things that are wrongs, arising from genuine moral dilemmas. We must accept this moral residue, but we also do better not to dwell on our misdeeds. On this view, committing moral wrongs is part of the core of undercover work. The best we can do is to embrace the values we gain: in this case, the reduction of crime and the increase in security. It retains, nonetheless, a tragic element, since it is necessary that the work is performed, and those who perform it commit wrongs, thereby performing a sacrifice.<sup>7</sup>

The dirty hands model is unsatisfying. A public that takes on board this view of manipulative policing will correctly feel that it puts wrongful acts at the centre of police practice. The wrongs may be justified by appeal to necessity, but unease will remain. Furthermore, one can reasonably expect that the effects of an internalisation of a dirty hands ethic by agents of a practice that is inherently secretive would be to encourage further secretiveness. A belief on the part of its agents that the practice is not wrongful is more conducive to public justification and regulation.

### **The Instrumental Model**

An alternative view holds that covert work is justified where its harms are outweighed by its benefits. Call this the 'instrumental' model. The instrumental model is in evidence in its purest form in contexts outside of undercover policing. Consider foreign signals intelligence. As General Michael Hayden, former head of the US National Security Agency, recently said, 'I am simply going out there to retrieve information that helps keep my countrymen free and safe. This is not about guilt ... NSA doesn't just listen to bad people. NSA listens to *interesting* people.'<sup>8</sup> In foreign intelligence, there is no strong or established practice of due process. Rather, the focus is upon efficacy. The answer to the question of whether or not resources, including privacy-intruding resources, should be expended in one area rather than another is determined by the outcome of a cost-benefit analysis.

What if this set of norms were extended from foreign signals intelligence into the domestic context involving undercover agents? Such a state of affairs has precedent. Consider the historic involvement of the intelligence services in the British Communist Party:

In the international communist movement, the British party was a laughing stock, correctly assumed to be so thoroughly penetrated that it was virtually a

branch of the Security Service. As Roger Hollis [Director General of MI5] told the home secretary in 1959, 'we [have] the British Communist Party pretty well buttoned up.' It was more than mere containment, says [David] Cornwell [MI5/MI6 Officer], who ran agents into the party. 'We kept it afloat. In fact, we owned it'.<sup>9</sup>

Around half a million files were made on communists or communist sympathisers, of which twenty thousand were members of the British Communist Party – but of all of these, only a few were ever prosecuted. How are we to interpret these numbers? A justification of this practice would have to begin within what I am calling the instrumental view. The use of security resources in order to spy on people in virtue of their political views, without any aspiration towards criminal prosecution, could only be explained on the grounds that the practice serves some more general security aims.

The instrumental view is not attractive. Whereas the dirty hands view clings too firmly to the status of covert policing as wrongful, the instrumental view is uncomfortably blasé. Intrusions by undercover police can take place against people who are not believed to be involved in any wrongdoing. A stark example is in the FBI's effort to locate fugitives from the Weather Underground faction of Students for a Democratic Society:

A federal agent posing as a radical infiltrated a student milieu thought to be close to this faction. He developed a relationship with a political activist, and she became pregnant. After considerable indecision, and at the urging of the agent, she had an abortion. His efforts did not locate the fugitive. The agent's work then took him elsewhere, and he ended the relationship. The woman apparently never learned of his secret identity and true motives.<sup>10</sup>

That is an extreme case.<sup>11</sup> We now know such a practice has taken place in the UK over a number of years. Secondary intrusions of a less powerful kind are likely to be extremely common. As one author notes: 'A typical undercover operation with strong intelligence aimed at drug trafficking will enable officers to draw up a detailed picture of the private lives of those involved, and their associates, innocent or otherwise.'<sup>12</sup> The trouble with the instrumental view is that it gives no direct differential ethical consideration to those who are (a) useful targets who are acting criminally; (b) useful targets who are not criminal or otherwise wrongful actors; and (c) those affected collaterally by the targeting of others. Intuitively, those are different cases. Let us develop a more convincing position.

### **The Liability Model and Self-Defence**

According to a natural viewpoint, we should have little sympathy for those whose interests are set back by covert policing, where those investigated are correctly suspected of involvement in crime. How can we account for this? It seems to be a case of a forfeiture of rights. The criminal's wrongful plans and behaviours cancel the moral complaint he would otherwise have. We can theorise this view by appeal to the principles that arise from considerations of personal self-defence. These cases provide a

useful guide for our intuition, since they are structurally similar: they are also cases of rights-forfeiture.

### *Complaints*

Distinguish first between an infringement and violation of a right. A 'rights violation' is a rights infringement that is not justified. A 'rights infringement' engages a right and gives rise to a complaint, but may on balance be justified.<sup>13</sup> In a paradigm case of self-defence, one is morally permitted to use force in order to overcome a culpable threat. In so doing, one does not infringe upon the rights of one's attacker. Rather, by culpably creating the threat, the attacker forgoes his right not to be harmed. In the case of an innocent threat, we respond differently. Suppose someone will harm you through no fault of her own – she is going to fall onto you – and you can divert her body away from you, thereby harming her and saving yourself. In that case, it seems that by defending yourself, you (arguably justifiably) infringe upon the rights of the innocent threat. The culpable attacker, on the other hand, by creating a threat, loses a right not to be harmed. This is not just because by harming one's attacker, one saves oneself, but because of the attacker's responsibility for creating the threat.

The intuition that guides these cases also appears to be at work in cases of manipulative or deceptive police investigation. The man who takes part in an online child pornography distribution ring makes himself liable to kinds of state action that set back his interests. These actions include his being systematically tricked, so that he reveals facts about himself and those using the ring. In taking part in the ring, he forgoes a number of rights, including his right against being deceived and manipulated. The harm that this person has unleashed is something that can be prevented or mitigated partly through means that impose direct costs upon him. He is morally culpable for a threat in the sense that he is responsible for a possible harm; his actions render him liable to being used as a means to the end of preventing or mitigating that harm.<sup>14</sup>

Compare that case to the known-innocent subject of useful deception. Sometimes it will be useful for covert police to deceive or manipulate those who are uninvolved in any criminal wrongdoing.<sup>15</sup> For example, police may spy on the family, sexual partners, or travel agent of their primary targets. Suppose that the intrusion is small and the security benefit is great. If such practices are ever on balance justified, many will still sense that those on the receiving end have their rights infringed. This contrasts with our sense that the culpable have no complaint at all.<sup>16</sup>

### *Proportionality*

Proportionality constraints apply in self-defence cases. Suppose B threatens only a minor violation of A's personal space: B threatens to step on A's foot. In this case it is not permissible for A to shoot B dead as a preventive measure, even if this is the only way to avoid the threat. Similarly, ethical proportionality considerations apply in policing. The recent activities of police officers in infiltrating UK protest groups appears to the general public disproportionate – especially in going to the extreme depths of deception involved in having and raising children with their targets.<sup>17</sup> In these cases, the harm to be prevented was direct public protest action. Is this undercover action a

proportionate measure against a group whose most clear plan is to close down a power station for a week, with the goal of seeking media attention on environmental issues? Many would think not.

Proportionality in self-defence involves comparing not only the harm threatened and the harm used to avert the threat, but also the attacker's culpability for the threat. One whose slight negligence gives rise to a threat of some small harm, H, makes himself liable to less defensive harm than one who maliciously aims at H. (I return to this in the following section.) On this view, then, just as a higher degree of culpability makes a threat liable to a greater self-defensive force, so also does a higher degree of culpability make a criminal liable to more intrusive or harmful investigative practices.

Innocent threats, of course, might warrant justified self-defensive force,<sup>18</sup> and so also in the case of policing does it seem that culpability for a possible harm is not a necessary condition for on-balance-justified manipulation or intrusion. Proportionality considerations apply. One does not forfeit all of one's rights against being harmed simply in virtue of being any threat at all; rather, one becomes more liable to intrusion and manipulation where, other things being equal, one is more responsible for the possible harm that is to be prevented.<sup>19</sup> The key point is that where the target of covert police work is culpable for a possible harm, intrusive and manipulative policing action can take place in a way that does not violate rights. In the governance of covert police work, this idea suggests that intrusion on the culpable ought to be less restricted than intrusion on the non-culpable.<sup>20</sup>

### *Imperfect Knowledge*

Compare two cases. In the first, there are reasonable grounds to believe that person A is involved in serious criminal activity. The police infiltrate A's social grouping, and prevent A from acting in the way she intended. In the second, there are reasonable grounds to believe that person B is involved in serious criminal activity. The police infiltrate B's social grouping, and discover that B is not involved in serious criminal activity. Suppose that the infiltration creates setbacks for both A and B: they are manipulated, their privacy is intruded upon, their lives are affected in ways that they would not choose. What do we say about these cases? In the first case, we tend to feel that A has no ground for complaint regarding the setback she faces. She made herself liable to the harms of deception and manipulation. In relation to her planned acts, the harms she incurs in the course of the investigation do not just pale in comparison; a common intuition has *no sympathy at all*. It holds that A has not been wronged. On the other hand, in cases of the second sort, we tend to interrogate the facts of the case. Was there really reasonable suspicion? Was there an abuse of process? Did the police follow its own codes of best practice? Should these be altered? We are unlikely to hold that B has not been wronged at all. If the facts of the case are urged upon us – there were reasonable grounds for suspicion, these were faulty, and nobody acted, *ex ante*, in error – then we still feel sympathy for B, and furthermore, sense that he has a legitimate complaint.

We can draw upon one prominent account of analogous intuitions in the context of self-defence in order to develop this thought.<sup>21</sup> Suppose X suspects that Y is culpable for some threat to X, and holds this belief with likelihood *p*. At some levels of *p*, it must be reasonable for X to engage in acts of self-defence. If X's beliefs turn

out to be mistaken, and Y in fact posed no threat, then we want to say that X acted wrongly, at least in the sense that Y has been wronged. It also seems correct to say that X acted reasonably. Our norms cannot tell someone who reasonably but mistakenly believes he is under attack that he should not respond with force, and our norms also cannot say of someone who reasonably but mistakenly believed he was under attack that he acted rightly. If this is the correct view (bearing in mind that other positions on fact- and evidence-relative obligations are available),<sup>22</sup> then in our analogy to covert police work, the manipulation of an innocent infringes upon his rights, even if the fact of his innocence becomes accessible only after the manipulation. He has a complaint even where the manipulation is the result of reasonable but mistaken suspicion.

Apart from being culpable for a threat, one can also become liable to defensive force by being culpable for causing people to believe that one is a threat. Suppose that as part of a provocative conceptual art project someone dresses up as a bank robber, withdraws some of his own cash from the bank desk, and dashes out of the building with the money in a sack labelled 'swag'.<sup>23</sup> This may warrant some police attention. The analogy to self-defence is now helpful. This case is equivalent to one in which a person performs acts that create the impression of a threat, even when there is none. In both cases it will be a matter of degree and context how far we deem the act wrong in itself as a needless creation of fear and disruption, and how far we deem it a humorous poke at a culture of excessive security. In neither case is the person culpable *for a threat*. Now suppose police deploy intrusive methods upon the joke bank robber, on the grounds of the reasonable suspicion that he created. That is a case that we judge differently to one in which a target becomes subject to reasonable but mistaken suspicion through no fault of her own. And similarly, if we apply the reasoning of the previous paragraph, defensive harm to a person who one reasonably but falsely believes to be a threat *does* inflict a wrong, even if it was one that it was reasonable to inflict.

## Developing the Model

The liability model is attractive, and avoids the problems of the dirty hands and instrumentalist views. It allows us to say that at least some covert police work is not rights-infringing, and that other such work may be rights-infringing but justified on balance.<sup>24</sup> It makes a sharp distinction between police work that impacts harmfully on those who are culpable, and police work that impacts harmfully on the innocent. I suggest, further, that it provides a useful tool for thinking about policy. By abstracting away from the immediate politics of the question, it facilitates reflection on ideal practice. If we are to develop a plausible ethic of covert policing, this seems to be the correct path to follow. Nonetheless, it is incomplete. In this section I will indicate several areas in which it needs development. These are: the details of the connections between personal self-defence and policing; its connection to the ethical controversy over self-defence; its revisionary potential regarding police judgment of responsibility; the non-imminence of threats in policing cases; the question of culpability for inevitably defeated threats; and the deployment of police against harmless wrongs.



*From Self-Defence to Policing*

There are several ways in which we might think about the connection between the ethics of self-defence and the ethics of policing. I will describe three possibilities: a direct connection, an analogy, and an appeal to common root principle.

The direct connection appeals to a social contract. One way of understanding and justifying police power is to proceed in Lockean terms, according to which we each surrender to the state our natural right to enact justice personally.<sup>25</sup> Such a view is consonant with the police's historical aspiration to 'policing by consent'. That slogan evokes an agreement into which those who are policed voluntarily enter. According to this view, personal self-defence is one kind of individual enactment of justice, and police are agents of our own powers. They carry out a function that each of us carries out for ourselves in a state of nature. If police act on our behalf in this way, then one would expect that there are cases in a non-state context in which individuals may act in the way that police may act. This approach takes the self-defence idea quite literally. Police step in and protect us using means that, were there no police force, we would have a right (and need) to use ourselves. The surrender of this individual right of self-protection to the state has the advantage of introducing means that are unavailable in the individual case: personal self-defence does not provide the resources for an intelligence operation, but by collectively passing on these rights to the state, we enable yet greater protections, such as the use of concerted manipulation and deception.

The appeal to self-defence need not be so literal. Instead of running the view through the apparatus of a social contract, we may instead focus upon the comparable structure of cases of personal self-defence, and cases of manipulative policing. As I have shown, in asking who has a legitimate complaint, both undercover policing and personal self-defence evoke similar forms of response. We might thereby conclude that the coherence of our network of intuitions is improved by bringing the cases in to contact and examining how the principles in one case will read across in to the other – and where, if they do not, what makes the relevant difference. Furthermore, in the personal self-defence case, we take away the issues concerning the way in which police act as agents of citizens – that is, issues of abuse of power and use of discretion – and focus on the principles governing what police can legitimately aim to do. This gives reason to think that examining personal self-defence as an analogy for policing provides in one way a purer test for certain intuitions.

A third way to move from personal self-defence to policing is by generalisation of principle rather than direct analogy. In the self-defence case, individuals respond themselves to threats. In the policing case, the response to the threat is made by an agent of the individual threatened. The similarity is sufficient to expect a congruence of governing principle. For example, in the context of discussing criminal legislation that has a preventive goal, Kimberley Ferzan argues that if we are committed to intuitive principles of self-defence, then we thereby commit ourselves to analogous principles of preventive state action.<sup>26</sup> These aren't the same principles, but they have the same root. In both cases, comparable considerations relating to the idea of liability seem to apply.<sup>27</sup>



### *Culpability and Other Elements of Liability*

To be culpable for a threat is to be blameworthy for a threat that is unjustified. If only the culpable are liable to defensive harm,<sup>28</sup> then the innocent target of useful police manipulation is on a moral par with the bystander who is used as a shield against a threat. Such innocents have a moral complaint, though harm against them might still be justified on the weight of good consequences.

Factors other than culpability may be relevant to liability to self-defensive harm. Some hold that a thin notion of responsibility for an action can make a person liable to defensive harm.<sup>29</sup> Call this the ‘agency’ view. An individual is agent responsible for an action where the action can be attributed to her: she freely chose the action, was of sound mind, and so forth. One would be agent responsible but not culpable for a threat to a pedestrian’s life if one’s well-maintained car runs out of control towards him as one drives past. Others hold that the innocent can be liable to defensive harm by posing a threat that would also violate a person’s rights, even where *no* agency is involved on the part of the innocent in creating the threat.<sup>30</sup> Call this the ‘unjust threat’ view.

How might the agency and unjust threat views play out in a policing context? They would be more permissive. Many activities involve risks of imposing or facilitating a harm. As the head of an internet service provider, you risk hosting communications channels that are used for the purposes of paedophile groups. This risk will generate some duty to cooperate with police. Furthermore, on the agency view, it may also make one liable to intrusive state activities, such as surveillance or ‘equipment interference’ (i.e. hacking), if those are among the most effective ways of mitigating the threat. Similarly, on the agency and unjust threat views, if one takes part in a political group that has a hidden violent wing, one may thereby become liable to a degree of manipulative infiltration tactics, even if the violent goals of the group are well-hidden, insofar as one (unknowingly) contributes to the threat. If the members of the family, the lover, or travel agent, of a serious criminal contribute to the threat he poses, then, on this position, they too make themselves liable to some preventive harm, even if this contribution is unintended and the criminality is hidden from their view.

It is beyond the scope of this article to make a ruling on the scope of liability to defensive harm. Crucially, there is general agreement that culpability is a factor that feeds in to proportionality, even if it is not *necessary* for non-rights-infringing defensive harm.<sup>31</sup> That is, other things equal, those who are more culpable are liable to more harm.

### *Judgments of Responsibility*

This is a welcome result. Consider a stylised operational context in which police have a choice of two strategies. They may infiltrate a group by focusing manipulative and deceitful efforts at one of two elements of a group. One element of the group is exploited by the other. The former is made up of people who are recruited from a young age, are dependent on the drugs the group supplies them, and have reason to fear physical assault should they show disloyalty. The latter receives the lion’s share of the remuneration of the group’s activities, and is made up of a smaller number of people who are powerful enough to choose their actions and are fully aware of their

effects. This example raises the question, is there *any* reason to prefer the manipulation of the second group over the first, keeping constant the expected operational outcome? At the very least, it seems there is some (non-decisive) reason to prefer manipulative efforts that target the second group, because those whose interests are to be set back by such activities are more culpable and so more liable to intrusive tactics.

Compare this to the way in which the equivalent point works in the debate on just war. It is often argued that since facts are so difficult to acquire in war, we would have to wait until 'laser-guided weaponry [is complemented] with guilt-seeking missiles' before the culpability view of war makes it possible to kill justly.<sup>32</sup> Many combatants are not individually morally responsible for the threat posed by the force of which they are a part – they may be conscripts, they may deliberately fire their guns so that they miss – and there is no way for their adversary to differentiate which these are. On the other hand, police *do* have access to many facts, and are equipped with processes that seek truths. Part of an investigation's purpose, unlike a war, is to seek out truths.

This gives rise to a concern. By incorporating the liability view in to our policing practices, we might expand police beyond their traditional role. If police are asked to express and act upon full moral judgments of culpability, do we blur the traditional divide between the role of investigators and that of courts? If, in acting covertly or in authorising and managing a covert operation, officers must judge not only the degree of threatened harm, but also the degree of full moral responsibility for the threat, then they will have to make judgments of the kind that would normally be reserved until a trial, when questions of circumstances mitigating a punishment are raised, or when defences relating to insanity or necessity are made. This runs against a popular understanding of the role of police: they exist in order to prevent harms and to facilitate the judgment of the court. The liability view would seem to recruit them also into the process of judgment.

The tension may be mitigated with a requirement for judicial warrants for undercover operations, as the UK Government's Independent Reviewer of Terrorism Legislation has recently recommended.<sup>33</sup> But more generally, we may be better off rejecting the sharp distinction between the judicial and investigative roles, accepting that police work itself involves close ethical judgments of responsibility. Indeed, we do this already in accepting police discretion.<sup>34</sup> The view of proportionality that excludes culpability has the benefit that it yields a position in which police judge only whether or not an action is occurring. But it has the cost that it yields a position in which police are in principle indifferent between imposing hardships on the exploited and the exploiter, if the expected operational outcome is similar.

### *Urgency*

There are differences between self-defence and policing cases. A prominent difference is urgency. In self-defence cases a key issue is whether the attacker is (or would be) culpable for the harm that would occur, were no defensive intervention to take place. Paradigm cases involve waiting until the attack is imminent. Pre-emptive strikes are difficult to justify. Police interventions, on the other hand, take place in slower motion. The immediacy is not present. An express goal of covert police work is to facilitate an intervention well before a threatened criminal harm occurs. This might be thought

to provide a relevant difference between the moralities of personal self-defence and policing.

However, the most plausible reason for the need for immediacy in cases of legitimate personal self-defence is that before the attack is imminent, it is typically not the case that it can be established with sufficient certainty that self-defensive force is necessary in order to avert the threat. In the case of policing, where the information-attaining power of the state is at work, things are different. Police can be aware that an individual threatens a harm far in advance of his placing his finger on a trigger.

### *Culpable For What?*

If a person is, or would be, culpable for a possible harm, then she forgoes a right against harmful intervention. We can understand the referent of 'harm' so that it is the exact harm that would occur, were preventive force not to be used. This gives rise to a possible disanalogy between policing and personal self-defensive cases. This is well-illustrated with a police sting. From a certain perspective, someone who offers to sell contraband to a police officer who is acting undercover threatens no harm at all. If the sale goes ahead, the goods will be destroyed. It seems that the right comparison is not with a pure case of personal self-defence. In those cases, if the attacker is not deflected, a harm occurs. The right comparison appears to be to an attacker who, unknown to him, has been rendered safe. His gun was emptied of bullets earlier by the person who is to be threatened. Just as the sale of contraband to police will not involve the distribution of goods into the wrong hands, so the unwittingly disarmed attacker will be unable to cause a harm if he pulls his trigger. Is it permissible to harm the unwittingly disarmed in order to prevent him from carrying out what he wrongly believes would be a harmful attack? The intuitive answer is 'no'. After all, what good comes of this harm? By hypothesis, if he pulls his trigger, nothing will happen. But what police do when they carry out a sting is equivalent to harming an unwittingly disarmed attacker. Does that mean that police stings are impermissible – or is there a morally relevant disanalogy between stings and harm to attackers who cannot succeed?

One response would be to subjectivise fully the understanding of harm. On this view, if someone is culpable for what she believes is a possible harm, then she forgoes a right against intervention. This would retain the analogy between the sting and the self-defence case, but deny the intuition that we cannot harm the disarmed attacker.

That intuition is difficult to abandon. We can do better than that. Policing and personal self-defence cases have an important similarity, which is that it is difficult to describe instances of genuinely harmless unwittingly disarmed attackers. Those whose attacks fail by one means are likely to find others. And those whose sales of contraband fail by one means are likely to find others. Someone who sells illicit goods to a police officer who is acting under cover also threatens to perform the same harm in selling such goods to those who would use them. We would do better to understand the threatened harm in this case to be wider than just the imminent harm of selling the goods involved in the sting, but also the implied threat to continue to deal in contraband. If so, the police operation can, after all, be morally comparable to a case of self-defence. It is an intervention at a non-imminent stage of the threat.

How do we deal with intrusions and manipulations where a target's plans and activities are not criminal at all, including any inchoate offence? Consider, for example, the

recent case in which a paid informant for the New York Police Department's intelligence unit was under orders to 'bait' Muslims into making remarks in favour of terrorism.<sup>35</sup> Leaving aside for the moment the issues of entrapment, to which I return below, and assuming for the sake of argument that the strategy has some security value, it is relevant here that manipulations were visited upon those not suspected of posing any threat. The liability view handles this case well. Police involvement where there is not yet a crime, even an inchoate crime, is comparable to self-defence where there is not yet a threat, but only a possible future threat. Culpability on the part of the purported future threat is absent and such cases therefore fall under the heading of intrusions that must be justified by the high bar of a preponderance of good consequences, analogous to harming the innocent bystander in exchange for a significant benefit.

*Prospective Harms, Retrospective Wrongs, and Harmless Wrongs*

In working from principles of self-defence, it appears that we are able only to consider possible future harms. The self-defence model involves a possible harm that can be prevented. An individual who has previously carried out some unjust threat, and no longer poses a further threat, does not call for defensive action. This points us towards the conclusion that police, as understood through the lens of the liability model, should be prepared to make greater intrusions in preventing criminal acts, than they would be in pursuing criminals for prosecution, where there is reason to believe that the person is unlikely to reoffend.

In practice the distinction between investigating the threatened and the unpunished crime will often be invisible. That an individual has committed a crime and has faced no reprimand is some evidence that he will commit further crimes. Nonetheless, the implication remains that a credibly repentant unpunished elderly war criminal is liable to less intrusion than a conspiring war-criminal-to-be. That is not counterintuitive. But it is questionable that the credibly repentant criminal is liable to the same level of intrusion as the pure innocent, and that seems to be the case on the liability model, since both the innocent and the reformed but unpunished criminal are equally non-threats. Is it ever permissible for undercover police to deploy with an entirely retrospective outlook? The liability model seems to give a presumption against this.

Furthermore, by requiring that liability to harmful investigation is predicated upon a threatened harm, it seems that we preclude the possibility that those involved in harmless but justifiably criminalised wrongs can make themselves liable to seriously intrusive investigations. In practice, again, this may be of relatively little consequence. The kinds of acts that intuitively make a person liable to the deception and manipulation that attach to undercover police work typically tend towards harm. As well as more immediate harms such as the sale of weapons, the facilitation of the communications of a terrorist group, or the distribution of child pornography, indirectly harmful activity such as money laundering may also create liability to intrusive investigation in virtue of its contribution towards destructive organised criminal institutions. Some may take the view that illicit drug sales can be harmless but also create liability to intrusive investigation. Such sales may be harmless in the sense that each transaction represents a genuine Pareto improvement. But they may give rise to liability to intrusive investigation since drug distribution networks typically engage in serious crimes on an

organised scale, and investigations into individual sellers may allow police access to intelligence about the more deeply harmful workings of the group. However, such a case would better be understood as one of indirect harm: the degree of involvement in the institution of the drug market that is typically necessary to act as a seller may itself be counted as perpetuating a harm – and insofar as it is not, we are less inclined to say that the seller is liable to heavily manipulative police involvement.

The issues of retrospective wrongs and harmless crimes give rise to the question of how far the liability view will extend. Is the self-defence analogy appropriate for *all* coercive police activity, including in its responses to less serious crimes, and to cases where no actual or future harm is involved? An ecumenical approach holds that the liability view itself is consistent with the existence of police goals other than the prevention of harm. It commits us to the idea that, other things being equal, a greater degree of culpability on the part of the target makes her liable to greater deception and manipulation. That claim permits that police may have other reasons to use undercover methods against a person. The facilitation of just punishment is one such possible reason.

It is possible, nonetheless, to sketch a view that has a stricter role for the idea of liability, drawing on the work of Victor Tadros on punishment.<sup>36</sup> Those who create a threat but are thereafter bystanders are liable to defensive harm in a way that pure bystanders are not. For example, suppose that in defending yourself against a bomb that cannot be defused, you can choose to throw either the person who set the explosives in the way of the blast, or an innocent. It seems that you should use the person who set the explosives. People can be liable to such ‘opportunistic’ harm if they are responsible for the threat. The person who creates the threat incurs this liability because he has a duty to avert it. He may *also* have a duty to avert other threats to the victim, particularly if he is unable to avert this particular threat. If one way of discharging that latter duty is through the general deterrence effect of punishment, then police will be warranted in using harmful methods, including deceptive and manipulative methods, for the purposes of facilitating the courts in bringing people to judgment.

A further possibility that should not be overlooked is that people can be liable to the kind of seriously harmful policework involved in undercover operations only with regard to its preventive, and not punitive, goals. On this view, the facilitation of pure retribution is not a ground for police manipulation, any more than people are morally permitted to take purely retributive actions where it is clear that no good would arise from doing so.<sup>37</sup>

## Implications

In the previous section I described a series of issues that the liability model of manipulative policing must face. A core idea of the model is that the extent to which individuals are liable to manipulative and deceptive policing methods is partly a function of the degree to which they are culpable for a possible harm. In this section I discuss what an adoption of this model would mean for the governance of policing. First, I describe the governance structure one might expect. Second, I outline and rebut an argument that the liability model is in practice virtually identical to the instrumentalist

view. Finally, I discuss the implications for intelligence-led covert police work and entrapment.

### *Governance Structure*

What kind of governance model would be warranted by the liability view? I will mention three features. These are: proportionality to harm, proportionality to culpability, and compensation for epistemically justified wrongs and consequentially justified harms. In the present governance structure in the United Kingdom, only the first of these is given proper due.

First, one would expect that greater intrusions and manipulations are warranted for those suspected of involvement in more serious crimes. The liability model expressly builds in a proportionality constraint that makes appeal to the harm that this threatened. This feature is built in to the current regime in the United Kingdom. The process under the existing legislation, the Regulation of Investigatory Powers Act 2000 (RIPA), requires that an authorising officer consider both the necessity of the action, and its proportionality to the seriousness of the crime to be investigated.

Second, one would expect a governance structure that requires a higher bar to be met in authorising an operation where the culpability on the part of those to be affected by the operation is believed to be lower. For example, if there is good reason to think that a person is directly involved in a crime, that person is liable to manipulation; but if someone is believed merely to be a useful target of manipulation, and there is little reason to believe she is culpable, then the justification of using undercover methods against her should be more difficult.

Remarkably, RIPA does not pay due to this requirement. It does not ask that authorising officers consider the extent to which there is reasonable suspicion of wrongdoing or criminality. It appeals instead to necessity and proportionality. It does require that 'collateral intrusion' is minimised – i.e. intrusion upon those who are not the 'target' of the investigation. But the accompanying Codes of Practice, including the most recent one which was issued in December 2014, state that usefully-intruded-upon innocents are *not* to be treated as 'collateral intrusions', but fall under the same standard of proportionality that is applicable to the suspected criminal.<sup>38</sup> Targets themselves are therefore to be selected according to security efficacy, without taking account taken of possible culpability or other concepts that are connected to liability, such as reasonable suspicion.<sup>39</sup>

Third, one would expect a governance structure that takes account of the epistemically justified wrongs and consequentially justified harms that police may commit. The former category involves, as we have seen, the wronging of innocents who are subject to manipulative police work, where there are reasonable but erroneous grounds for suspicion of their wrongdoing. If it turns out that the target is innocent (and not otherwise liable), then on the liability view he will have a moral complaint that he would not have were he involved in malicious activities.

Consequentially justified harms are those that occur against people who are not liable, but that are justified by a preponderance of good consequences. Even where there are no grounds for suspicion of involvement in wrongdoing, or even positive evidence of innocence, it is still possible that deception and manipulation are useful and justified, but this justification will need to cross the high bar of the kind that is



analogous to a justification of harming an innocent bystander for the sake of some very significant benefit.

In the cases of both epistemically justified wrongs and consequentially justified harms, a moral complaint remains, and so one would expect that where possible an appropriate form of recompense would be available to those who have a legitimate complaint. Compensation plausibly begins with a form of recognition. One might therefore expect that an element of this recompense would take the form the provision of information after the operation. This tells against the *exceptionless* principle of ‘neither confirm nor deny’ that is claimed by police in the United Kingdom in this regard.<sup>40</sup> That stance precludes the first step towards recognition of these wrongs that are a part of police activity.<sup>41</sup> To be sure, there will be cases in security considerations will override the *pro tanto* reason for transparency about the facts of an expired investigation. However, our current context is one in which there is precedent for the release of more information in a way that does not threaten security.<sup>42</sup> The next step would be a positive institutional effort at identification of information that can be released to those who have been wronged in this way.

#### *Is the Second Implication Undetectable?*

It may be the case that even if the rules governing the use of covert police do not legislate for sensitivity to culpability, there are, nonetheless, criminological facts and institutional pressures or habits that render it likely that the rules are applied in a way that responds to culpability. A reason to believe this is that police are typically involved with criminals. Why is this the case? The crime level is high, in comparison to the levels of resources present to combat it. Undercover policing is a relatively expensive strategy. The natural way to deploy this resource is to use it against those who are strongly suspected of committing crimes. In this context, where suspicion is plentiful in comparison with the resources that might be deployed to meet it, it would be wasteful to use policing resources anywhere else. Perhaps – continues the argument – there is a possible world in which the ratio of crime to crime-prevention resources is different. In that world, it becomes efficient for crime-prevention purposes to use covert officers often on those against whom there is no reasonable suspicion. This may be the kind of nightmare described in genuine totalitarian dystopias, or police states, where neighbours act as informants upon one another. But as things are, the marginal security benefit of focusing resources on those against whom there is strong suspicion of criminal activity is almost always higher than that which arises when focusing on those against whom there is not strong suspicion. Thus, in practice, we have, in effect, a liability model, even if its governance appears to be efficacy-focused.

This point can be further enforced with claims about institutional culture. Even though, as I have described, the legal sense of proportionality only very weakly demands any consideration of culpability, it is natural, nonetheless, for those implementing the rules as stated to ‘read in’ culpability considerations. A recent study shows that, despite its formal status as a piece of enabling legislation, RIPA has had a significant effect on limiting the practice of covert policing across the UK, and is considered by many officers to be excessively onerous.<sup>43</sup>

Nonetheless, if the liability model is guiding us, we would do better to implement it in express regulations or codes of practice, rather than to depend upon the empirics to



ensure its application. This is because the facts may change. It is in an important sense a matter of serendipity that the instrumental model will not in general intrude upon the known innocent or the stranger. That is to say, whereas the liability view asserts that it is *in principle* permissible to engage in a greater intrusion upon those who are involved in a higher degree of harm, the instrumental view only has as a *likely outcome* that the more malicious will face more intrusions. Where there are exceptions to these likely facts, the liability view and not the instrumental view gives reason against further intrusion upon the innocent.

For example, undercover work can take place online, at a much lower level of investment of resources, and this may change the equation described above: it may become efficient (from a pure crime-prevention perspective) to apply deceptive tactics on those against whom there is no reasonable suspicion, in order to get leverage against an online community. The general infiltration of forensically aware elements of the internet might sow sufficient distrust in order to reduce its functioning. If this is a community that deals in, say, firearms or money laundering, such disruption is a useful preventive tactic. There is an important question concerning how broadly such distrust is useful sowed. If the instrumentalist goal of security is the only criterion at work, it is reasonable to expect an excessively broad answer. Furthermore, the institutional habit of seeking to get approval through RIPA may itself change. The courts have provided several strong precedents of permitting cases to proceed in spite of significant departures from RIPA codes.<sup>44</sup> This gives further reason to enact the liability view in law.

### *Intelligence and Entrapment*

Cases of intelligence-oriented manipulations also give rise to the important issue of entrapment, about which there is room to make only a few brief remarks here. If people can forfeit their right against being manipulated, does it follow that those already involved in criminality can legitimately be manipulated into further criminality? The manipulation of people into criminality can be useful in security terms. For example, an undercover officer makes contact with a person who works on the fringes of a criminal organisation. With an eye to broadening a possible channel of intelligence, the officer encourages this person to become more involved with the group. Depending on considerations of proportionality, the liability view allows this activity, and it is more permissive of this activity in proportion to the gravity of the criminality for which the target was initially culpable. Those who form loose associations with people who may be involved in direct action protest and the aggravated trespass offences that typically accompany it are liable to little such treatment, since associating with people who might perform aggravated trespass is not a very serious wrong. Those who are culpable for distributing child pornography may, on the other hand, become liable to manipulation into further such activity, where this would allow police to infiltrate the centre of an organisation that deals in illicit images.

Does this mean that those who are involved in low levels of criminality may be manipulated up a ladder of increasingly higher levels of criminality, each justified on the grounds of the previous act of wrongdoing, until at some point they are punished for a very serious transgression? That is not an attractive implication. It also does not follow from the liability view. This is because one of the standard objections to

punishing people for acts that the state has encouraged them to perform is also a reason why people's liability to manipulation will be limited. Thus, some argue that entrapment is objectionable because it undermines the agency of the target, which is a condition of criminal liability.<sup>45</sup> A diminishment of agency is also a reason that the target's culpability for a threat is reduced.

Some argue that there is a general reason for the police not to commission crime.<sup>46</sup> That is not inconsistent with the position I put forward here. In this case, it may become moot that people may be liable to manipulation into wrongful acts, since there is not a permissible institution that may carry out the manipulation. Alternatively, one may hold that there is a range of limits on acceptable police behaviour in the area of stings and entrapment,<sup>47</sup> and accordingly these limit the cases in which intelligence-based manipulation towards criminal acts may be used. In general, we may separate the question of what treatment people make themselves liable to, from the question of what treatment the police or the state may impose upon people. It is also theoretically open that people may permissibly be manipulated without being liable to punishment for the act that they committed while being manipulated. So it may be the case that punishing someone as a result of an internet sting aimed at child molesters amounts to draconian preventive detention<sup>48</sup> or punishment based upon unjustified moral subversion<sup>49</sup> – but it may also be the case that the intelligence-directed sting is warranted on the grounds of liability to prevent a harm, even if punishment for the ensuing criminal acts is not.

## Concluding Remark

In this article I have laid the groundwork for the liability view of undercover policing. It draws from our ideas about the ethics of personal self-defence. The view has the implication that police action in this area should be directly sensitive to the wrongs of its targets. Certain trends in policing, such as the shift towards intelligence models, and the lower cost of mounting online covert operations, imply that this implication will increasingly have practical manifestations. I proposed three ways in which the governance of undercover policing should be structured in accordance with the liability view. Two of these – proportionality to culpability, and recompense for complaints that arise from epistemically or consequentially justified police actions – are not currently given proper due in the UK.

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## NOTES

- 1 She states: 'Mark Cassidy, as [he] then was, joined the group in about 1994, and I started a relationship with him in about May 1995 ... I met him when I was 29, and he disappeared about three months before I was 35. It was the time when I wanted to have children, and for the last 18 months of our relationship he went to relationship counselling with me about the fact that I wanted children and he did not ... I have had recurring dreams ... I imagined being followed' Home Affairs Committee, 'Minutes of Evidence: HC 837', 2013 <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/130205i.htm>>.
- 2 I use 'liability' to refer to moral liability, not legal liability, throughout this article.
- 3 Kimberly Kessler Ferzan, 'Beyond crime and commitment: Justifying liberty deprivations of the dangerous and responsible', *Minnesota Law Review* 96 (2011): 141; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).
- 4 John Kleinig briefly entertains a version of the liability view in the following terms: 'inhabitants of the world of criminal activity, a world that by definition relies on force and deception, must expect that force and deception will be used to counter them. Criminals can hardly express surprise if they are investigated by deceptive means' (*The Ethics of Policing* [Cambridge: Cambridge University Press, 1996], p. 133). He rightly retreats from that version of the view. It appears to have the implication that torturers and sexual abusers are liable to torture and sexual abuse by the police when those methods are deployed as preventive measures. He thus notes that '[m]eans are independently evaluable, and not just in relation to their ends.' (Kleinig op. cit., p. 301 n28). The evaluation of ends that he subsequently provides departs from the liability idea. Seumas Miller conceives of the police function as 'the protection of justifiably enforceable moral rights' (*The Moral Foundations of Social Institutions: A Philosophical Study* [Cambridge: Cambridge University Press, 2010], p. 262). He incorporates into his position the view that 'human rights ... are justifiably enforceable; for example, A has a right not to be assaulted by B, and if B assaults or attempts to assault A, then B can legitimately be prevented from assaulting A by means of coercion' (Miller op. cit., p. 247). So, justifiably enforceable rights include human rights, and the 'enforcement' of a right can include the use of coercion. This would seem to suggest that those who act wrongly make themselves liable to harmful police action. However, although it is implicitly present, this idea is not fully carried through in Miller's text: he does not discuss proportionality, and does not draw a clear distinction between cases that involve the liability of somebody who intends to commit a wrong, and harms to innocents that are on balance justified by their ends. He sums up his view as, 'harmful and normally immoral methods are on occasion necessary to realize the fundamental end of policing', offering several examples, including, 'a drug dealer might have to be deceived if a drug ring is to be smashed, a blind eye might have to be turned to the minor illegal activity of an informant if the flow of important information he provides in relation to serious crimes is to continue' (Miller op. cit., p. 264). Consistent attention to liability would draw a sharp distinction between those cases, where the first involves the deception of someone who is liable to such treatment, whereas the second involves harms to innocent victims of the informant's minor crimes.
- 5 The norm is present in the requirement of reasonable suspicion that attaches to searches, as governed by the Police and Criminal Evidence Act (1984). The concept of liability will naturally extend beyond the context of the regulation of undercover work into other areas of policing, both those involving deception and manipulation, and those that do not. I focus on the undercover context in this article because its governance is so far from taking account of the idea of liability, and because this form of policework in particular warrants scrutiny.
- 6 Gary T. Marx, 'Ethics of undercover investigations' in D. Callahan, P. Singer & R. Chadwick (eds) *Encyclopedia of Applied Ethics* (San Diego, CA: Academic Press, 2011), p. 446.
- 7 Michael Walzer, 'Political action: The problem of dirty hands', *Philosophy & Public Affairs* 2 (1973): 160–80, at pp. 176–7.
- 8 Michael Hayden, 'Keynote address: Cybersurveillance in the post-Snowden age', 2015 <<http://www.lawfareblog.com/lawfare-podcast-episode-108-general-michael-hayden-cybersurveillance-post-snowden-age> at 13:10>.
- 9 Frances Stonor Saunders, 'Stuck on the flypaper' *London Review of Books* 9 April (2015): 3–10.
- 10 Gary T. Marx, 'Under-the-covers undercover investigations: Some reflections on the state's use of sex and deception in law enforcement', *Criminal Justice Ethics* 11,1 (1992): 13–24, at p. 18.

- 11 A distinct objection may be raised against this case that is consistent with the instrumental view. This is that the benefits of the actions of the officer could not be expected to outweigh their very serious costs. I add to this argument a further objection that is *inconsistent* with the instrumental view: that no special consideration appears to have been given to the non-culpability of the target.
- 12 Clive Walker & Kingsley Hyland, 'Undercover policing and underwhelming laws', *Criminal Law Review* 8 (2014): 572.
- 13 Judith Jarvis Thomson, 'Some ruminations on rights' in W. Parent (ed.) *Rights, Restitution, and Risk: Essays, in Moral Theory* (Cambridge, MA: Harvard University Press, 1986), p. 51.
- 14 It is worth distinguishing the view I put forward here from a related but different view. An alternative view is that criminal culpability *itself* creates liability to intrusion and manipulation. The view I put forward here holds that the prevention of possible harm does extra explanatory work. A version of the former kind of view is advanced by Christopher Heath Wellman in defending 'the rights forfeiture theory of punishment,' which is 'the view that we should concentrate on which rights wrongdoers forfeit because this forfeiture is necessary and sufficient to explain the permissibility of punishment.' ['The rights forfeiture theory of punishment', *Ethics* 122 (2012): 371–93, at p. 375.] That seems an anaemic account of punishment, since we tend to look to factors invoked by more traditional theories of punishment (such as retribution, deterrence, and so forth) in understanding which rights wrongdoers forfeit. Similarly, it would be an anaemic account of legitimate police action to say that criminal activity is necessary and sufficient to explain the legitimacy of harmful police actions. My position allows further explanation by holding that by wrongfully creating a threat one makes oneself liable to greater preventive harm.
- 15 The extent of 'wrongdoing' in which police can rightly get involved will depend upon the proper bounds of the criminal law: we do not tend to think that bad people are liable to more aggressive police intrusions, if their badness manifests itself only in non-criminalisable acts.
- 16 I do not commit to the claim that culpability is necessary for non-rights-infringing self-defensive harm; only, that our typical reactions to the kinds of case I describe involve a sense that a right has been infringed upon. Some argue that in personal self-defence cases, certain innocent threats and innocent attackers are liable to defensive force. That is, their rights are not infringed by self-defensive force. If this is the case, the analogy with policing will function differently. We should abandon our sense that the analogous innocent upon whom it is useful to spy is wronged. Nonetheless, as I propose below, proportionality permits greater intrusions upon and manipulations of those who are culpable.
- 17 Paul Lewis & Rob Evans, *Undercover: The True Story of Britain's Secret Police* (London: Guardian Faber Publishing, 2014).
- 18 Compare Jeff McMahan, 'Self-defense against morally innocent threats' in P.H. Robinson, S. Garvey & K.K.Ferzan (eds) *Criminal Law Conversations* (Oxford: Oxford University Press, 2011), pp. 384–406; and Judith Jarvis Thomson, 'Self-defense', *Philosophy & Public Affairs* 20,4 (1991): 283–310.
- 19 For an argument against this view, see Jonathan Quong, 'Proportionality, liability, and defensive harm', *Philosophy & Public Affairs* 43,2 (2015): 144–73. On Quong's view, the mode of agency, and not responsibility, is a factor in determining a proportionate self-defensive response.
- 20 How much harm is it proportionate to use in fending off a threat? It is permissible to kill in self-defence against the person who threatens to severely harm but not kill you: see Suzanne Uniacke, 'Proportionality and self-defense', *Law and Philosophy* 30,3 (2011): 253–72, at p. 261. If so, we can expect that police may similarly cause greater harm to those they pursue than the harm they are seeking to prevent.
- 21 Jeff McMahan, 'Self-defense and culpability', *Law and Philosophy* 24,6 (2005): 751–74, at p. 771; see also Kimberly Kessler Ferzan, 'Justifying self-defense', *Law and Philosophy* 24,6 (2005): 711–49, at p. 728.
- 22 For alternative views see Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011), chapter 7; David McCarthy, 'Actions, beliefs, and consequences', *Philosophical Studies* 90,1 (1998): 57–77.
- 23 Thanks to Victor Tadros for pointing me to this real life example.
- 24 One might also combine the metaethical of the dirty hands view with the liability view, and hold that it is more wrong to manipulate the innocent than the culpable, but that an ineliminable wrong remains where the culpable are manipulated. Analogously, one may believe that one wrongs a culpable aggressor even in harming him in proportionate self-defence.
- 25 Kleinig op. cit.
- 26 Ferzan 2011 op. cit., p. 173.
- 27 A yet further task is to explicate the role of the relationship between principles of self-defence and principles of defence of others, and to connect this to the policing context. The simplest answer is that 'the

- permissibility of X's killing Y in self-defense goes hand in hand with the permissibility of Z's killing Y in defense of X, and that both phenomena have a common source': Thomson 1991 op. cit., p. 306.
- 28 For example, Michael Otsuka, 'Killing the innocent in self-defense', *Philosophy & Public Affairs* 23,1 (1994): 74–94.
  - 29 For example, Jeff McMahan, 'The basis of moral liability to defensive killing', *Philosophical Issues* 15,1 (2005): 386–405; but c.f. Seth Lazar, 'Responsibility, risk, and killing in self-defense', *Ethics* 119,4 (2009): 699–728.
  - 30 For example, Thomson 1991 op. cit.
  - 31 For example, McMahan, 'Self-defense and culpability' op. cit.; Tadros op. cit.; Uniacke op. cit.; but c.f. Quong op. cit.
  - 32 Lazar op. cit., p.701.
  - 33 David Anderson, *A Question of Trust* (Report of the Investigatory Powers Review, 2015), p. 300 <<https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/>>.
  - 34 Thomas V. Svogun, *The Jurisprudence of Police: Toward a General Unified Theory of Law* (Basingstoke: Palgrave Macmillan, 2013).
  - 35 'Informant: NYPD paid me to bait Muslims' <<http://www.ap.org/Content/AP-In-The-News/2012/Informant-NYPD-paid-me-to-bait-Muslims>>
  - 36 Tadros op. cit.
  - 37 Again, in practice, it will be hard to identify such a case of pure retribution, insofar as there is a general deterrence effect of punishing the retired criminal.
  - 38 Home Office, 'Covert Surveillance and Property Interference Code of Practice, Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000', 2014, sec. 3.11 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384975/Covert\\_Surveillance\\_Property\\_Interference\\_web\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Covert_Surveillance_Property_Interference_web_2_.pdf)>.
  - 39 Tim Newburn, Tom Williamson & Alan Wright, *Handbook of Criminal Investigation* (London: Routledge, 2012), p. 434.
  - 40 College of Policing, 'Undercover policing', 2015 <<https://www.app.college.police.uk/app-content/covert-policing/undercover-policing>>. Thanks to [...] for suggesting this point.
  - 41 The position is not fully settled. The Information Tribunal held last year that where relevant information is held, the justification for withholding it from interested parties must occur on a case-by-case basis, and not with reference to a blanket policy of 'neither confirm nor deny' Simon McKay, *Covert Policing: Law and Practice* 2nd edition (Oxford: Oxford University Press, 2015), pp. 379–80.
  - 42 Lewis & Evans op. cit.
  - 43 Megan O'Neill & Bethan Loftus, 'Policing and the surveillance of the marginal: Everyday contexts of social control', *Theoretical Criminology* 17,4 (2013): 437–54.
  - 44 Walker & Hyland op. cit.
  - 45 Paul M. Hughes, 'What is wrong with entrapment?', *The Southern Journal of Philosophy*, 42 (2004), 45–60; see also Gerald Dworkin, 'The serpent beguiled me and I did eat: Entrapment and the creation of crime', *Law and Philosophy*, 4 (1985), 17–39.
  - 46 Andrew Ashworth, 'What is wrong with entrapment?', *Singapore Journal of Legal Studies* (1999), 293–317.
  - 47 Walter Sinnott-Armstrong, 'Entrapment in the Net?', *Ethics and Information Technology* 1 (1999), 95–104.
  - 48 Joseph S. Fulda, 'Internet stings directed at pedophiles: A study in philosophy and law', *Widener Law Journal* 15 (2005), 47.
  - 49 Jeffrey Howard, 'Moral subversion and structural entrapment', *Journal of Political Philosophy* 24,1 (2015): 1–134.